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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

05-CR-621 (RJS)

5 GARY ALAN TANAKA,

6 Defendant.

Conference

7 -----x

8 New York, N.Y.  
9 January 31, 2014  
3:10 p.m.

10 Before:

11 HON. RICHARD J. SULLIVAN,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
Southern District of New York

17 BY: BENJAMIN NAFTALIS, ESQ.

Assistant United States Attorney

18 FISHER & BYRIALSEN & KREIZER, PLLC

Attorneys for Defendant

19 BY: JANE H. FISHER-BYRIALSEN, ESQ.

20 FRED COHN, ESQ., CJA Attorney

21 ALSO PRESENT: VIVIEN SHEVITZ, ESQ.

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(In open court; case called )

THE COURT: For the government?

MR. NAFTALIS: Good afternoon, your Honor. Benjamin Naftalis for the government.

THE COURT: Okay. Mr. Naftalis, good afternoon.

And for Mr. Tanaka?

MS. FISHER-BYRIALSEN: Good afternoon, your Honor. Jane Fisher-Byrialsen for Mr. Tanaka.

THE COURT: And Ms. Shevitz, you're --

MS. SHEVITZ: I'm Mr. Tanaka's appellate lawyer as of now.

THE COURT: His appellate lawyer as of now?

MS. SHEVITZ: Well, yes. Yesterday Nat Dershowitz was supposed to be relieved in the Court of Appeals because Mr. Tanaka can't pay them anymore for cert, so I'm probably substituting him, but I'm also his lawyer in the SEC case and --

THE COURT: Oh, okay.

MS. SHEVITZ: -- he would like to stick with me.

THE COURT: You can sit there, but obviously you're not his counsel for purposes of this conference.

We're here in connection with whether or not Ms. Fisher-Byrialsen is going to continue as counsel, whether or not Mr. Tanaka will go pro se, or whether we'll have new counsel appointed or retained. So I just want to go over with

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1 the parties, remind everybody I think where we've been.

2 So on November 15<sup>th</sup> Ms. Fisher-Byrialsen made a  
3 motion to withdraw as counsel. The following day Mr. Tanaka  
4 submitted a letter to the court requesting that he be allowed  
5 to proceed pro se and explaining his reasons for that. And  
6 then on December 4<sup>th</sup> Ms. Fisher-Byrialsen sent a letter  
7 indicating that Mr. Tanaka wished to withdraw his prior request  
8 to proceed pro se but he nevertheless wished to have alternate  
9 CJA counsel appointed to represent him. And then I guess most  
10 recently I adjourned this conference I think at the request of  
11 counsel and because not much was really happening, so I put  
12 this over from the end of December until now.

13 So that I think is the state of the letters and the  
14 requests. Have I missed anything? Is there anything else that  
15 I've overlooked?

16 MS. FISHER-BYRIALSEN: No.

17 THE COURT: No. Okay. So Mr. Tanaka, let me ask you,  
18 do you want to proceed pro se? You don't want to do that,  
19 right?

20 THE DEFENDANT: No, I don't want to do that.

21 THE COURT: No, you don't want to do that, so that  
22 request is withdrawn. So that's fine.

23 The next issue then is, should Ms. Fisher-Byrialsen  
24 continue to represent you or should you have a new lawyer to  
25 represent you?

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1           So let me switch over to Ms. Fisher-Byrialsen. You  
2           had made a motion to be relieved. Are you still making that  
3           motion? That motion is still --

4           MS. FISHER-BYRIALSEN: Your Honor, I believe that  
5           Mr. Tanaka would like to have alternate counsel.

6           THE COURT: Well, that may be, and that's relevant to  
7           the inquiry, but there might be a lot of defendants who have  
8           CJA counsel who would like a different lawyer, but that's not  
9           the inquiry. The inquiry is whether or not the communications  
10          between appointed counsel and client have so broken down as to  
11          basically render the possibility of representation impossible  
12          or near to it. But obviously if you are moving to withdraw  
13          still, then I think we have to deal with that first. So are  
14          you making that motion?

15          MS. FISHER-BYRIALSEN: Yes, your Honor.

16          THE COURT: You still are.

17          MS. FISHER-BYRIALSEN: Yes.

18          THE COURT: All right. And have you discussed with  
19          Mr. Tanaka your reasons for making that motion?

20          MS. FISHER-BYRIALSEN: Yes.

21          THE COURT: All right. And your view is that you  
22          can't continue to represent Mr. Tanaka in this case.

23          MS. FISHER-BYRIALSEN: Yes.

24          THE COURT: All right. And --

25          MS. FISHER-BYRIALSEN: Your Honor, I think that the --

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1 yes, but there's more to it than that, but I don't think that I  
2 can reveal the reasons why because I believe that they're  
3 protected by attorney/client privilege. It's not that I don't  
4 wish to represent Mr. Tanaka, but I think that our relationship  
5 has reached such a stage where our communication is not  
6 productive and not functioning the way it should.

7 THE COURT: All right. Not functioning the way it  
8 should. I'm not sure if there's only one way in which it  
9 should, but can you be more specific as to how it's not  
10 functioning the way it should?

11 MS. FISHER-BYRIALSEN: Not really. Not -- I think  
12 that I -- that this is an extremely awkward position because I  
13 think that --

14 THE COURT: Well, but is it going to change? I'm  
15 going to appoint a new CJA lawyer and they're going to be in  
16 the exact same position you are, right? Because it's really  
17 about whether or not Ms. Shevitz is really representing  
18 Mr. Tanaka in this case, even though that's not technically the  
19 case, right? Is Mr. --

20 MR. COHN: I'm standing here so I can hear, your  
21 Honor, because I think it's germane to whatever it is I do.

22 THE COURT: I just want to make it clear for the  
23 record that Fred Cohn is here. Mr. Cohn is the CJA duty  
24 lawyer, and so if there were to be a replacement of counsel, it  
25 would be Mr. Cohn, because it's his turn.

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1 All right. So that's my question. Is there anything  
2 about representing Mr. Tanaka that's going to change with new  
3 counsel?

4 MS. FISHER-BYRIALSEN: Well, I can't say that, your  
5 Honor, because situations arise where, in a hypothetical sense,  
6 the client may wish something to happen and the lawyer may  
7 disagree, and I don't know what's going to happen in the future  
8 in regards to that, but that has happened in this  
9 attorney/client relationship which has caused massive rifts, I  
10 would say, and I don't know if that's going to happen in the  
11 future. I can't read the future. But it could very well  
12 happen or it might not. I don't -- I mean, I think that's a  
13 virtually impossible question to answer. If -- I mean, I think  
14 that I have done everything within the canons of ethics to  
15 represent Mr. Tanaka and do so the way that I think is best  
16 possible, but we have had major disagreements and, I mean, I'm  
17 sort of -- it's very hard to answer that question because I  
18 can't divulge any of the conversations that we have had, so --

19 THE COURT: Well, I mean, at this point I'm not asking  
20 you to, but I don't know that you can't at some point if  
21 pressed.

22 But in any event, Mr. Tanaka, let me ask you, you've  
23 expressed some dissatisfaction with Ms. Fisher-Byrialsen, and  
24 that's fine. I mean, nobody has to think their lawyer is  
25 perfect. The issue, though, is: Has the level of

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1 communication between you and Ms. Byrialsen degenerated to such  
2 a point that you really can't go forward with her as your  
3 lawyer?

4 THE DEFENDANT: Well, I think what you said in the  
5 beginning, your Honor, is symptomatic in the sense that counsel  
6 has moved to be relieved, and this happened without my prior  
7 consultation and without my knowing it, so that would give you  
8 an example of the scope of the breach.

9 THE COURT: All right. But you agree with the  
10 ultimate conclusion, though, that you don't think that you can  
11 communicate with Ms. Byrialsen at this point, given the water  
12 under the bridge, given the state of your communications and  
13 relationship.

14 THE DEFENDANT: I would think so.

15 THE COURT: All right. I think I've heard enough to  
16 grant the request, so I'm going to appoint Mr. Cohn to  
17 represent you. I mean, some of the issues that arose before as  
18 a source of conflict between you and Ms. Byrialsen may arise  
19 again with Mr. Cohn. I don't know enough about it to say one  
20 way or the other, but I think we'll give Mr. Cohn an  
21 opportunity. He's a lawyer on the CJA panel so he's an  
22 experienced, capable lawyer who's been recognized as such by  
23 the judges of this court. He's been on the panel for many  
24 years. How many years?

25 MR. COHN: Longer than she's alive, I think.

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1           THE COURT: Okay. All right. So Mr. Cohn is coming  
2 into this case pretty cold. There's a lot of history to this  
3 case, obviously, but I think he's a pretty quick study, so  
4 we'll give him a chance to get to know you. You folks should  
5 talk. And Ms. Fisher-Byrialsen, you should submit to Mr. Cohn  
6 all of your materials, all of your file on this case, and then  
7 Mr. Cohn, maybe I'll have you get back in touch with me in a  
8 few weeks to let me know just whether you think you need more  
9 time or what you propose.

10           MR. COHN: Fine. I can certainly do that, your Honor.  
11 Can I --

12           THE COURT: Yeah, hop over, yes. Walk around would  
13 probably be better.

14           MR. COHN: I can do that.

15           The court should know that I have -- I mean, getting  
16 up to date I can do in a couple of weeks. I have a trial  
17 starting on March 4<sup>th</sup>, which is a murder trial, and I have a  
18 big set of civil papers due by March 5<sup>th</sup>. So I won't be able  
19 to do the actual resentencing work until sometime after that.

20           THE COURT: All right. Well, the mandate hasn't yet  
21 been issued, I don't think. We haven't gotten it yet, right?  
22 So until that happens, you know, nothing is happening at this  
23 point, and I've got to get the mandate back.

24           MR. COHN: That's fine. I just wanted to tell you my  
25 scheduling problems because being a lawyer on the panel the



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1 number of years that I have been, I'm told -- and I don't work  
2 24 hours a day anymore, so --

3 THE COURT: All right. Well, in any event, you'll  
4 need some time to get up to speed, so I think just a status  
5 letter from you in three weeks, is that enough?

6 MR. COHN: That's fine, your Honor.

7 THE COURT: I expect we'll probably get the mandate  
8 between now and then, but who knows. I don't know.

9 MR. COHN: Very good.

10 THE COURT: And then if something changes, then I'll  
11 let you know, I'll bring you back in, but in the meantime you  
12 will certainly have time to talk to Mr. Tanaka.

13 MR. COHN: He's at MDC? Old or new building?

14 MS. FISHER-BYRIALSEN: New, new.

15 MR. COHN: All right. Fine.

16 THE COURT: All right. So let me know if you need  
17 anything else from me. Obviously talk to the government if you  
18 need anything from them. Ms. Shevitz is representing  
19 Mr. Tanaka in other capacities and so you can talk to her as  
20 well. There's a lot to learn, but I have no doubt that you'll  
21 get up to speed. Okay.

22 MR. COHN: Sounds like a lot of talking to me.

23 THE COURT: Ah, maybe.

24 All right. So that's, Mr. Tanaka, what we're going to  
25 do. Mr. Cohn is now your lawyer. And then we'll touch base in

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1 a few weeks. But if you need anything between now and then,  
2 talk to Mr. Cohn and we can bring you back in sooner, okay?

3 Okay. So the Marshals are okay with Mr. Tanaka  
4 getting the card from Mr. Cohn, right? Yeah. All right.

5 That's really the sole purpose of today, as far as I'm  
6 concerned. Is there anything else we need to discuss?  
7 Mr. Naftalis?

8 MR. NAFTALIS: No, your Honor. Just should we wait on  
9 the court if the mandate does issue in that window --

10 THE COURT: Once the mandate issues, then I'll give  
11 instructions to the parties.

12 MR. NAFTALIS: Perfect. Terrific.

13 MS. SHEVITZ: I don't know if it's -- I will represent  
14 Alberto Vilar for this too, so I don't know if it's too early  
15 to talk about this, but I was going to suggest possibly that a  
16 updated presentence report, since it's been --

17 THE COURT: Maybe. But you know what, let's not do  
18 anything without Mr. Vilar. I think once the mandate issues,  
19 depending on when that comes relative to when I'm getting  
20 Mr. Cohn's status letter, I may schedule a conference to just  
21 talk about scheduling.

22 MS. SHEVITZ: Okay.

23 THE COURT: Or I'll issue an order that does the same.  
24 I'll issue an order that does the same. Okay? So --

25 MR. COHN: Thank you, your Honor. Have a nice

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1 weekend.

2 THE COURT: You too. Thanks. Enjoy the Super Bowl.

3 All right. Let me thank the court reporter for her  
4 time and let me thank the Marshals as well for theirs.

5 Okay. Have a good day. And Ms. Byrialsen, thank you.  
6 Just make sure you hand off all the stuff to Mr. Cohn. Good.

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